

IN THE WATER COURT OF THE STATE OF MONTANA
CLARK FORK DIVISION
KOOTENAI RIVER BASIN (76D)
PRELIMINARY DECREE

* * * * *

CLAIMANT: Russell F. Dutton

CASE 76D-0120-R-2023
76D 128915-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must serve a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Water Right Claim 76D 128915-00 appeared in the Preliminary Decree for the Kootenai River Basin (Basin 76D) issued May 6, 2021. This claim received an issue remark. Issue remarks result from Department of Natural Resources and Conservation ("DNRC") claims examination or by Water Court order. Claims examination confirms

the historical use of water right claims and identifies issues with claims. If claims examination cannot confirm some aspect of a claim, an issue remark is added to the claim. This claim did not receive any objections or notices of intent to appear.

Further proceedings are not necessary to resolve the issue remark. However, for organizational purposes this claim is consolidated into Water Court Case 76D-0120-R-2023.

FINDINGS OF FACT

1. Claim 76D 128915-00 appeared with the following issue remark:

THE CLAIMED PRIORITY DATE MAY BE QUESTIONABLE. THE PRIORITY DATE ON THE SUBMITTED NOTICE OF APPROPRIATION IS 12/19/1906.

2. The claimed right is based on a Notice of Appropriation filed August 6, 1923. This document indicates the water was first put to use in the “fall” of 1906. The priority date is listed as November of 1906 on the March 11, 1982 Statement of Claim form. The DNRC later modified the priority date to November 30, 1906 to make it complete.

3. It is unclear where the month of December is referenced in the Notice of Appropriation. There are multiple references to the “fall of the year 1906” but the undersigned Master could not locate any reference to first beneficial use in December of 1906. The notation of November on the Statement of Claim form and the DNRC’s modification to November 30, 1906 indicates “fall of the year 1906” should be interpreted as November.

4. A review of the source index for the Preliminary Decree of Basin 76D indicates there are no other appropriations on the claimed source, Pinkham Creek, with a priority date in 1906. Whether the priority date is in November or December of 1906 does not affect the order of priority for the claimed right.

5. The issue remark should be removed.

APPLICABLE LAW

1. A properly filed statement of claim is prima facie proof of its content. Section 85-2-227, MCA. The prima facie status of a claim may be overcome by a

preponderance of the evidence. Section 85-2-227, MCA; Rule 19, W.R.Adj.R. A preponderance of the evidence is evidence that shows a fact is “more probable than not.” *Hohenlohe v. State*, 2010 MT 203, ¶ 33, 357 Mont. 438, 240 P.3d 628.

2. The Water Court must weigh an issue remark, and the information resulting in that issue remark, against the claimed water right. Section 85-2-247(2), MCA.

3. The Water Court must resolve all issue remarks not resolved through the objection process. Section 85-2-248, MCA. The Court must review information in the claim file or obtained by the Court to determine if there is a sufficient basis to resolve the remarks. 85-2-248(3), MCA.

4. If the Court sets a priority date incorrectly, but the incorrect or arbitrary priority date does not affect the order of priority on a source, the incorrect priority date is harmless error. *Vidal v. Kensler*, 100 Mont. 592, 594, 51 P.2d 235, 236, 1935 Mont. LEXIS 114, *2.

CONCLUSIONS OF LAW

1. The priority date may be decreed without modification because the issue remark and information leading to the placement of that remark do not overcome the prima facie status of the above-captioned claim. Additionally, the proposed priority date would not affect the order of priority regardless of whether it is November 30, 1906 or December 19, 1906.

2. The information in the record provides the Court with a sufficient basis to resolve and remove the issue remark from the above-captioned claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the issue remark be removed from the above-captioned claim. A post-decree abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state’s centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW.

Service via USPS Mail:

Russel F. Dutton
PO Box 152
Eureka, MT 59917

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
KOOTENAI RIVER
BASIN 76D**

Water Right Number: 76D 128915-00 STATEMENT OF CLAIM

Version: 3 -- POST DECREE

Status: ACTIVE

Owners: RUSSELL F DUTTON
PO BOX 152
EUREKA, MT 59917 0152

Priority Date: NOVEMBER 30, 1906

Type of Historical Right: FILED

Purpose (use): IRRIGATION

Irrigation Type: SPRINKLER

Flow Rate: 49.37 GPM

Volume: THE TOTAL VOLUME OF THIS WATER RIGHT SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

Climatic Area: 4 - MODERATELY LOW

Maximum Acres: 3.00

Source Name: PINKHAM CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

| <u>ID</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|-----------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | | NENWSW | 5 | 35N | 27W | LINCOLN |

Period of Diversion: APRIL 1 TO OCTOBER 31

Diversion Means: PIT/DAM

Period of Use: APRIL 1 TO OCTOBER 31

Place of Use:

| <u>ID</u> | <u>Acres</u> | <u>Govt Lot</u> | <u>Qtr Sec</u> | <u>Sec</u> | <u>Twp</u> | <u>Rge</u> | <u>County</u> |
|---------------|--------------|-----------------|----------------|------------|------------|------------|---------------|
| 1 | 3.00 | | E2NWSW | 5 | 35N | 27W | LINCOLN |
| Total: | 3.00 | | | | | | |